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Cibao Meat Products and Local 169, Union of Needle Trades, Industrial and Textile Employees.¹ Case 2–CA–32811

September 12, 2006

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
SCHAUMBER AND WALSH

On May 10, 2005, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's supplemental decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ as modified below and to adopt the recommended Order as modified and set forth in full below.

As indicated in the underlying Decision and Order in this case,⁴ the Respondent unlawfully discharged production worker Jose Luis Mendez, after a group of coworkers, including Mendez, protested the unlawful suspension of his brother. The judge found that Mendez is entitled to backpay for the entire backpay period beginning on

January 18, 2000, and ending on December 6, 2004, when the Respondent offered Mendez reinstatement. The Respondent excepts, arguing that Mendez' backpay should be denied in certain quarters because he willfully concealed his interim earnings. For the following reasons, we agree with the judge's findings.⁵

In *American Navigation Co.*, 268 NLRB 426, 428 (1983), the Board stated that it would deny backpay for any quarters in which a discriminatee has willfully concealed interim employment. The Board further stated that this remedy will be applied "only in cases where the claimant is found to have willfully deceived the Board, and not where the claimant, through inadvertence, fails to report earnings." See also *Hagar Management Corp.*, 323 NLRB 1005, 1007 (1997) (same); *Brown Co.*, 305 NLRB 62, 67–68 (1991) (same). Thus, "poor recordkeeping, uncertainty as to memory, and perhaps exaggeration" do not automatically disqualify an employee from receiving backpay. *Pat Izzi Trucking Co.*, 162 NLRB 242, 245 (1966), *enfd.* 395 F.2d 241 (1st Cir. 1968).

Mendez did not deliberately mislead the Board or withhold information concerning his interim earnings and employers. From the outset of the backpay investigation through the conclusion of the hearing, Mendez fully disclosed his employment by Art-Lore, Inc., Templar Associates, and as a livery cab driver. Compare *American Navigation Co.*, *supra* (finding willful concealment where discriminatee deliberately failed to disclose an interim employer). There is no evidence that Mendez held any other employment during the backpay period. Moreover, Mendez made a good-faith effort to accurately report his earnings from those employers. Indeed, he voluntarily updated his reported earnings from Art-Lore by producing a 2000 W-2 form that showed higher earnings than he initially reported.⁶ By reporting higher earnings, Mendez reduced the Respondent's backpay liability. Conduct of this character is inconsistent with an intent to willfully conceal interim earnings. See *Brown*, *supra* (backpay not tolled where discriminatee came forward with additional earnings information that reduced respondent's backpay liability).

¹ We have amended the caption to reflect the disaffiliation of the Union of Needle Trades, Industrial and Textile Employees from the AFL–CIO effective September 14, 2005.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We have corrected the following mathematical and typographical errors in the judge's decision:

Appendix A: Total first quarter 2000 cab expenses are \$717.25; total third quarter 2001 cab expenses are \$2,059.24; and total fourth quarter 2001 cab expenses are \$2,059.24.

Appendix B: First quarter 2000 interim expenses are \$936.25; third quarter 2001 expenses are \$2,059.24; fourth quarter 2001 expenses are \$2,059.24; second quarter 2002 interim expenses are \$3,038; third quarter 2002 interim expenses are \$3,688; fourth quarter 2002 interim expenses are \$3,463.25; third quarter 2003 interim earnings are \$5,525; fourth quarter 2003 interim earnings are \$3,200. In accordance with these corrections, the total backpay is \$59,967.96.

⁴ *Cibao Meat Products*, 338 NLRB 934 (2003), *enfd.* 84 Fed. Appx. 155 (2d Cir. 2004), *cert. denied* 543 U.S. 986 (2004).

⁵ The Respondent also asserts that Mendez' backpay should be tolled because he improperly limited his search for interim employment and was discharged from interim employer Art-Lore, Inc., due to his own willful actions. The Respondent further argues that the General Counsel's backpay formula reflected an incorrect amount of overtime and that Mendez' expenses were not fully supported by documentary evidence. Finally, the Respondent asserts that the income derived from Mendez' rental of part of his residence and the subsequent profit from the sale of that residence should be treated as interim earnings. For the reasons stated in the judge's decision, we find no merit in these arguments.

⁶ In determining backpay, the General Counsel used the amount reflected in the W-2.

The Respondent nonetheless argues that a finding of willful concealment is warranted here, based on discrepancies between the interim income figures that Mendez provided to the Board and the interim income figures that he allegedly provided to other parties. Specifically, the Respondent points to 2000 and 2001 tax returns attached to a mortgage application, which indicate higher income than Mendez reported on the 2000 and 2001 tax returns he submitted to the Board. The Respondent also points to a credit card application in which Mendez' stated income for 2002 is higher than the income he reported on a 2002 tax return submitted to the Board.

Although we acknowledge the obvious discrepancies between the above items of evidence, we do not believe that the mere existence of such discrepancies suggests willful concealment. More importantly, the Respondent, who bears the burden of proof on this matter, has not shown that the above discrepancies reflect willful concealment of *earnings from the Board*. See *Atlantic Limousine, Inc.*, 328 NLRB 257, 257 (1999) (citing *Paper Moon Milano*, 318 NLRB 962, 963 (1995)). Mendez testified that the tax returns he submitted to the Board are consistent with those filed on his behalf with the Internal Revenue Service. The Respondent has not rebutted this testimony.⁷ Thus, at worst, Mendez exaggerated his earnings in order to enhance his application for a mortgage and credit card. Even assuming, arguendo, that this was an effort to mislead third parties, we do not believe that this should operate to reduce the Respondent's obligation to remedy its unfair labor practice. Further, it is not at all clear that Mendez himself sought to mislead the third parties. Mendez testified that the tax return submitted with his mortgage application had not been filed by him, and that he had not seen it before; likewise, he disclaimed knowledge of the credit card application at issue, saying it had been completed by his wife.

Notwithstanding the lack of persuasive evidence that Mendez deliberately sought to mislead the Board, our dissenting colleague argues that a reduction in Mendez' backpay is necessary and appropriate here, given the uncertainties arising from the inconsistent interim earnings figures in evidence.⁸ To equitably resolve these

uncertainties, our colleague proposes that the Board take the average of the interim earnings figures that Mendez testified to and those suggested by his credit applications, treating Mendez' interim earnings as this average figure. We do not agree that such a measure is warranted here.

Initially, we note that our dissenting colleague cites no Board precedent to support his "averaging" approach. In our view, such an approach erodes the burdens carefully established by the Board in backpay cases. It is the Respondent's burden to prove willful concealment. *Atlantic Limousine, Inc.*, supra. Where the respondent has carried its burden of showing willful concealment in a given quarterly period, backpay for that period is eliminated entirely. See *American Navigation Co.*, supra, 268 NLRB at 428. Where, as here, no such concealment is shown, backpay may yet be reduced by interim earnings. Again, however, the respondent bears the burden of proving that interim earnings are otherwise than alleged in the compliance specification. See *Atlantic Limousine, Inc.*, supra.

Here, the Respondent has not carried its burden of proving that the General Counsel's interim earnings calculations are inaccurate. Nonetheless, our dissenting colleague says that he is "suspicious" and "uncertain" about the figures reported by Mendez. However, it is clear that mere suspicion and uncertainty are not enough to meet the Respondent's burden of proof.⁹ See *St. Barnabas Hospital*, 346 NLRB No. 70 (2006), slip op. at 2 ("Suspicion and surmise are no more valid bases for decision in [the] backpay hearing than in an unfair labor practice hearing.")

In these circumstances, we believe it would be inappropriate to adjust Mendez' backpay in accordance with the averaging scheme proposed by our dissenting colleague. The most that can be said in this case is that there is no complete assurance that the General Counsel's interim earnings figures are a precise reflection of Mendez' interim earnings. However, such lack of complete assurance is not enough to satisfy the Respondent's settled burden of proof as set forth above. Moreover, we see no reason to relieve the Respondent of this burden of proof, nor do we believe, as our dissenting colleague apparently does, that it would effectuate the policies of the Act to do so.

⁷ Chairman Battista notes that the Respondent could have, and should have, entered into evidence tax forms obtained from the Internal Revenue Service (IRS) if it wished to show that Mendez reported different income to the IRS than that reported to the Board. In the absence of any showing that Mendez underreported his income to either the Board or the IRS, all doubts should be resolved in favor of the claimant rather than the respondent wrongdoer. *Performance Friction Corp.*, 335 NLRB 1117, 1131 (2001); *Fabi Fashions*, 291 NLRB 586, 587 (1988).

⁸ Our dissenting colleague also opines that the interim earnings reported to the Board are "suspiciously low" considering that "Mendez

bought a piece of residential property valued at \$191,000 during the backpay period." The dissent's argument, however, rests only on suspicion, not proof, that Mendez failed to report interim earnings.

⁹ Interestingly, while noting several inconsistencies in Mendez' reported income at interim employer Art-Lore, our dissenting colleague "accepts" that Mendez earned \$765 at Art-Lore as "consistent with the record evidence," \$765 being the same figure that the dissent concedes was used by the Board agent in computing Mendez' interim earnings.

ORDER

The National Labor Relations Board orders that the Respondent, Cibao Meat Products, New York, New York, its officers, agents, successors, and assigns, shall make whole the party named below, by paying him the amount following his name, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings on the backpay due the discriminatee required by Federal and State laws:

Mendez, Jose Luis \$59,967.96

Dated, Washington, D.C. September 12, 2006

Robert J. Battista, Chairman

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAMBER, dissenting in part.

Introduction

I agree with my colleagues in all respects other than their decision not to reduce Mendez' backpay award. For the bulk of the backpay period Mendez was a livery cab driver in New York City. During this period, he completed a credit card application, which contained earnings information from his employment as a livery cab driver, and a mortgage application, which was supported by completed Internal Revenue Service tax forms. He provided the Board, however, with different, and suspiciously lower, interim earnings information as part of his quest for a backpay award. This information cannot be corroborated because Mendez failed to keep records of his livery cab earnings as required by New York City regulations. In these circumstances, the true amount of Mendez' interim earnings cannot reliably be ascertained. This is due not to inadvertent record-keeping errors or negligence, but rather to conflicting representations made by Mendez or others on his behalf for personal gain (securing credit and/or reducing tax liability). The Respondent bears no responsibility for this situation. For these reasons, an equitable adjustment of Mendez' backpay award is necessary and appropriate.

Analysis

Congress has authorized the Board under Section 10(c) of the Act to remedy unfair labor practices with "such affirmative action including reinstatement of employees *with or without* backpay, as will effectuate the policies of the Act." (Emphasis added.) The Act does not anticipate

that the Board will reflexively order whatever backpay is claimed due. Rather the Board, within its discretion, may determine whether a particular remedy will effectuate the policies of the Act. *Shepard v. NLRB*, 459 U.S. 344, 349 (1983). Thus, it is clear that a discriminatee is not automatically entitled to an award of full backpay solely by virtue of his illegal discharge. The question of whether this remedy should be awarded depends on our determination that such an award is necessary to effectuate the policies of the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 188 (1941). Moreover, the Supreme Court has admonished the Board not to "effectuate the policies of the . . . Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern Steamship Co. v. Labor Board*, 316 U.S. 31, 47 (1942).

A full backpay award would not, in this case, effectuate the policies of the Act. The backpay period is nearly five years long, running from January 18, 2000 to December 6, 2004. For approximately three and one-half of those years, May 2000 until October 15, 2003, Mendez worked as a livery cab driver. According to Mendez, he received dispatches via two-way radio to customers mainly in upper Manhattan and the Bronx, and occasionally made trips to the airports or to Brooklyn or Queens. In 2000, he claims he averaged about 12–14 fares per day but the record does not show his daily earnings for this period. Mendez further claimed that his livery cab earnings increased in subsequent years, as he learned the system, and amount to \$60 per day in 2001, \$75 per day in 2002, and \$80 per day in 2003.

The amount of interim earnings from his work as a livery cab driver that Mendez reported to the Board differs markedly from the amount of earnings he reported on a credit card application and in tax forms submitted with his mortgage application. For example, Mendez gave the Board agent a 2001 1040 that showed earnings of \$6700, but gave his mortgage company a 2001 1040 that showed earnings of \$32,055. He also gave the Board agent a 2002 1040 that showed earnings of \$7500, but stated on a credit card application that he earned \$37,000 in 2002.¹

¹ Mendez also failed to consistently report his earnings from interim employer Art-Lore, Inc. Mendez worked at Art-Lore from February 17, 2000 to March 3, 2000. He earned \$9 per hour. He reported to the Board agent that he earned \$280 from Art-Lore, but he gave the Board agent a W-2 showing \$765 in earnings from Art-Lore. The Board agent relied on that W-2 in determining Mendez' interim earnings. In response to the Respondent's subpoena, Mendez produced a second W-2 showing that he earned \$3574 from Art-Lore. Finally, Mendez reported to his mortgage lender that he earned \$23,840 from Art-Lore. I accept the \$765 figure because it is consistent with the record evidence establishing Mendez' wage rate and the length of time he worked at Art-Lore.

The uncertainty created by Mendez' failure to consistently report his earnings to his credit card company, his mortgage lender, and the Board could not be resolved by records of his earnings. Mendez failed to keep earnings records or maintain trip logs detailing his livery cab use, as New York City regulations require. He also failed to resolve the differing versions of his 2000 and 2001 tax forms by requesting accurate copies of his tax returns on file with the IRS. These documents were readily available to him but not to the Respondent.

My colleagues contend that Mendez' failure to consistently report his interim earnings does not warrant a reduction of his backpay award. According to my colleagues, at worst, Mendez may have "exaggerated" his earnings in order to enhance his application for a mortgage and a credit card. Elsewhere, the majority asserts that the most that can be said is that we lack "complete assurance" that the General Counsel's interim earnings figures are a precise reflection of Mendez' interim earnings. However, it confounds reason to call the livery cab earnings Mendez reported on his credit card and mortgage applications—which were supported by copies of completed IRS tax forms—"mere exaggerations." In addition to the deliberateness reflected in completing these applications, the earnings reported the Board are suspiciously low considering the nature of his interim earnings and the fact that Mendez bought a piece of residential property valued at \$191,000 during the backpay period. On this record, the income reported on Mendez' credit applications seems entirely reasonable.

The simple fact is that Mendez misrepresented his interim earnings from his livery cab either in his report to the Board, or in his credit card application, or in his mortgage application and in the completed IRS tax forms submitted with that application. The majority excuses these misrepresentations; I would not. Rather, because Mendez is responsible for these conflicting representations and failed to resolve them either with accurate copies of his Federal tax returns or the fare records he was required to keep by New York City

Finally, it is no answer to say, as my colleagues do, that the credit applications and, presumably the supporting tax records, were completed by others. Mendez was complicit in the production of the documents. He attested to their completeness and to the accuracy of the information they contained by signing them and he benefited from the representations they contained.

The Board has recognized that equitable principles sometimes militate in favor of reducing or even denying

a remedy to a discriminatee. *Ad Art, Inc.*, 280 NLRB 985, 988 (1986) (backpay denied where discriminatee's dishonesty concerning interim earnings extended throughout the backpay period); *Service Garage, Inc.*, 256 NLRB 931 (1981), enf. denied on other grounds 668 F.2d 247 (1982) (right to reinstatement and any backpay will be forfeited when discriminatee's conduct amounts to a malicious abuse of Board's processes); *American Navigation Co.*, 268 NLRB 426 (1983) (discriminatee will forfeit backpay for quarters in which he deliberately conceals interim earnings).² In keeping with these equitable principles, I would reduce Mendez' backpay award to take the average of the interim income claimed by Mendez at the hearing and in his various tax returns and credit applications.³ In this way, the Board could insure that a remedy is provided for the unlawful discrimination practiced by the Respondent while still accounting for the unnecessary uncertainty caused by Mendez' misrepresentations. Contrary to my colleagues' claim, this disposition does not erode "the burdens carefully established by the Board in backpay cases." Rather, it acknowledges the numerous uncertainties as to the amount of Mendez' interim earnings, where those uncertainties

² My colleagues also say that I am "suspicious" and "uncertain" about the figures reported by Mendez. They then cite to the judge's decision in *St. Barnabas Hospital*, 346 NLRB No. 70 (2006), for the proposition that "suspicion and surmise" are not valid bases for decision in a backpay proceeding. Although I noted in that case that the judge's statement of applicable law was incomplete and minimized a claimant's obligation to mitigate his damages, *id.* at 1 fn. 3, I agree with the stated proposition. But it has no application here. The true amount of Mendez' interim earnings is uncertain, as the majority implicitly acknowledges. In addition, that uncertainty was created by Mendez himself and cannot be resolved because he failed to keep records that would clear the matter up. Instead, he affirmatively misrepresented his earnings either to the Board or to third parties. I cannot see penalizing the Respondent for this uncertainty under these circumstances, and I believe the approach I am taking is a fair and reasonable one.

³ Balancing the uncertainty caused by Mendez with the Board's mandate to award backpay in such a way that effectuates the policies of the Act, I would use the following formula to determine Mendez' interim earnings from the livery cab:

1. 2002: Take the average of what he testified to (\$24,960) and reported to the credit card company (\$37,000) = \$30,980.
2. 2001: Take the average of what he testified to (\$23,790) and reported on the mortgage application (\$32,055) = \$27,922.
3. 2000: Take the average of what he testified to (\$12,600) and reported on the mortgage application (\$11,545) = \$12,072.50.

There are no discrepancies in the amount of interim income reported in 2003 and 2004; therefore, I do not propose changing the formula for those years.

were created by Mendez, while also not losing sight of the fact that he was unlawfully discharged.⁴

Dated, Washington, D.C. September 12, 2006

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

Appendix A

Interim Expenses from Driving a Cab

Q1 2000	Drug test	\$ 24.00
	Taxi license	\$ 120.00
	Fingerprinting	\$ 75.00
	Training Film	\$ 35.00
	Car Registration	\$ 425.25
	Car Inspection	\$ 38.00
	Total	\$ 717.25
Q2 2000	NYC Taxi Fee	\$ 550.00
	Glass Partition	\$ 450.00
	Two way radio	\$ 700.00
	Fee to Amsterdam	\$ 315.00
	Gasoline	\$ 183.00
	Auto Insurance	\$1,023.51
	Total	\$3,221.51
Q3 2000	Amsterdam	\$ 455.00
	Gasoline	\$ 265.00
	Auto Insurance	\$1,023.51
	Car Inspection	\$ 38.00
	Total	\$1,781.51
Q4 2000	Amsterdam	\$ 455.00
	Gasoline	\$ 265.00
	Auto Insurance	\$1,023.51
	Car Inspection	\$ 38.00
	Total	\$1,781.51
Q1 2001	Drug test	\$ 24.00
	Car registration	\$ 425.25
	Amsterdam	\$ 455.00
	Gasoline	\$ 265.00
	Auto Insurance	\$1,301.24
	Car Inspection	\$ 38.00
	Total	\$2,508.49
Q2 2001	NYC taxi fee	\$ 550.00
	Amsterdam	\$ 455.00
	Gasoline	\$ 265.00

Auto Insurance	\$1,301.24
Car inspection	\$ 38.00
Total	\$2,609.24

Q3 2001	Amsterdam	\$ 455.00
	Gasoline	\$ 265.00
	Auto Insurance	\$1,301.24
	Car Inspection	\$ 38.00
	Total	\$2,059.24

Q4 2001	Amsterdam	\$ 455.00
	Gasoline	\$ 265.00
	Auto Insurance	\$1,301.24
	Car Inspection	\$ 38.00
	Total	\$2,059.24

Q1 2002	Drug Test	\$ 24.00
	NYC Taxi Fee	\$ 550.00
	Amsterdam	\$ 455.00
	Gasoline	\$ 265.00
	Auto Insurance	\$2,280.00
	Car Inspection	\$ 38.00
	Total	\$3,612.00

Q2 2002	Amsterdam	\$ 455.00
	Gasoline	\$ 265.00
	Auto Insurance	\$2,280.00
	Car Inspection	\$ 38.00
	Total	\$3,038.00

Q3 2002	Amsterdam	\$ 455.00
	Gasoline	\$ 265.00
	Auto Insurance	\$2,280.00
	Car Inspection	\$ 38.00
	Camera for Taxi	\$ 650.00
	Total	\$3,688.00

Q4 2002	Amsterdam	\$ 455.00
	Gasoline	\$ 265.00
	Auto Insurance	\$2,280.00
	Car Inspection	\$ 38.00
	Car Registration	\$ 425.25
	Total	\$3,463.25

Q1 2003	Drug Test	\$ 24.00
	Amsterdam	\$ 520.00
	Gasoline	\$ 221.00
	Auto Insurance	\$2,280.00
	Car Inspection	\$ 38.00
	Total	\$3,083.00

Q2 2003	Amsterdam	\$ 520.00
	Gasoline	\$ 221.00
	Auto Insurance	\$1,941.24
	Car Inspection	\$ 38.00
	Total	\$2,720.24
	Amsterdam	\$ 520.00

⁴ That the Board has not previously ordered such a remedy is not dispositive. See *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349 (1938) (relief ordered by the Board must be "adapted to the [specific] situation which calls for redress.").

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Q3 2003								
	Gasoline	\$ 221.00			Car Inspection	\$ 38.00		
	Auto Insurance	\$1,941.24			Total	\$2,720.24		

Appendix B

Period	Weeks	Wkly pay	O/T	Gross	Interim earnings	Interim Expenses	Total	Backpay
Q1 2000	11	\$308.00	\$127.05	\$4,785.55	\$765.00	\$936.25	\$-171.25	\$4956.08
Q2 2000	13	308.00	127.05	5,655.65	3,240.00	3,221.51	18.49	5,637.16
Q3 2000	13	308.00	127.05	5,655.65	4,680.00	1,781.51	2,898.49	2,757.16
Q4 2000	13	308.00	127.05	5,655.65	4,680.00	1,781.51	2,898.49	2,757.16
Q1 2001	11	\$308.00	\$127.05	\$4,785.55	\$4,950.00	\$2,508.49	\$2,441.51	\$2,344.04
Q1 2001	2	320.00	132.00	904.00	900.00	0	900.00	4
Q2 2001	13	320.00	132.00	5,876.00	6,240.00	2,609.00	3631.00	2,245.00
Q3 2001	13	320.00	132.00	5,876.00	5,850.00	2,059.24	3790.76	2,085.24
Q4 2001	13	320.00	132.00	5,876.00	5,850.00	2,059.24	3790.76	2,085.24
Q1 2002	9	\$320.00	\$132.00	\$4,068.00	\$4,320.00	\$3,612.00	\$708.00	\$3,360.00
Q1 2002	4	332.00	136.95	1,875.08	1,920.00	0	1,920.00	0
Q2 2002	13	332.00	136.95	6,096.35	6,240.00	3,038.00	3,202.00	2,894.35
Q3 2002	13	332.00	136.95	6,096.35	6,240.00	3,688.00	2,552.00	3,544.35
Q4 2002	13	332.00	136.95	6,096.35	6,240.00	3,463.25	2,776.75	3,319.06
Q1 2003	9	\$332.00	\$136.95	\$4,220.55	\$3,825.00	\$3,083.00	\$742.00	\$3,478.55
Q1 2003	4	344.00	141.09	1,943.06	1,700.00	0	1,700.00	243.06
Q2 2003	13	344.00	141.09	6,316.07	5,525.00	2,720.24	2,804.76	3,511.94
Q3 2003	13	344.00	141.09	6,316.07	5,525.00	2,720.24	2,804.76	3,511.94
Q4 2003	13	344.00	141.09	6,316.07	3,200.00	0	3,200.00	3,116.07
Q1 2004	9	\$344.00	\$127.05	\$4,239.45	\$2,970.00	0	\$2,970.00	\$1,269.45
Q1 2004	4	358.00	147.62	2,022.48	1,320.00	0	1320.00	702.48
Q2 2004	13	358.00	147.52	6,571.76	4,290.00	0	4,290.00	2,281.76
Q3 2004	13	358.00	147.52	6,571.76	4,290.00	0	4,290.00	2,281.76
Q4 2004	9	358.00	147.52	4,549.68	2,970.00	0	2,970.00	1,579.68
						Total		\$59,967.96

Vonda Marshall, Esq., for the General Counsel.
Irene Thomas, Esq., for the Respondent.
Stuart Lichten, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this backpay case in New York City on December 7, 2004, and February 23, 24, and 25, 2005.

This case is based on a backpay specification that was issued by the Regional Director for Region 2 on August 5, 2004. The Board's underlying decision is reported at 338 NLRB 934 (2003), and was enforced by the Second Circuit Court of Appeals on May 30, 2004.

The original backpay specification alleged that the Respondent owed certain amounts (with interest), to three employees, Modesto Flores, Cayetano Flores, and Jose Luis Mendez. However, during the hearing, a settlement was reached regarding the backpay for Modesto Flores and Cayetano Flores. I approved that settlement.

That leaves for disposition, the backpay of Jose Luis Mendez.

On December 14, 2004, the General Counsel amended the specification based on documents such as payroll records that she obtained at the opening of the hearing. The amendments were as follows:

1. Based on an unconditional offer of reinstatement, the General Counsel alleged that the backpay period ran from January 18, 2000, to December 6, 2004.

2. The General Counsel alleged that the predischARGE average weekly earnings for Jose Luis Mendez were \$435.05 and therefore that his weekly gross backpay from January 18, 2000, to March 18, 2001, would be \$435.05. Based on the collective-bargaining agreement in effect during this period of time, the General Counsel argues that Mendez would have received raises during 2001, 2002, 2003, and 2004 so that his weekly gross backpay for each period would be \$452, \$468.95, \$485.90, and \$505.62.

3. After the hearing opened, the General Counsel amended the specification to substantially increase Mendez' interim earnings. However, she also amended the specification to substantially increase his alleged interim expenses. The result was a somewhat larger net backpay claim and the total backpay claim here \$76,621.21 plus interest.

The Respondent's counsel made a number of contentions. First, she contended that Mendez willfully concealed his interim earnings and therefore that he should be denied backpay. Secondly, she asserted that Mendez failed to mitigate his losses by failing to seek comparable employment during the backpay period.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the Briefs filed, I make the following

FINDINGS AND CONCLUSIONS

A. Gross Backpay

The testimony of the Region's compliance officer was

that she calculated the gross backpay based on an examination of the Company's payroll records which were produced at the opening of the hearing on December 7, 2004. In this regard, the compliance officer, relying in part on these records and the testimony of the Company's vice president, Lutz Vieluf Isidor, determined that as of December 1999, Mendez received \$7.70 per hour and that the wage rate for this job would have been the same in 2000. The compliance officer determined that as of March 15, during each year from 2001 to 2003, Mendez, along with the other employees, would have received wage increases pursuant to the terms of a collective-bargaining agreement.

Isidor testified that most employees tended to work an average of 10 to 12 hours of overtime per week during the backpay period. Based on this testimony the compliance officer assumed that Mendez would have worked an average of 11 hours overtime per week during the backpay period. Notwithstanding the Respondent's assertion that Mendez worked an average of 9.38 hours during the final quarter immediately prior to his discharge in 1999, the General Counsel's proposed formula seems to me to be a proper basis of determining the amount of overtime hours that Mendez would have worked during the backpay period had he not been illegally discharged.¹

B. Interim Earnings and Interim Expenses

Mendez credibly testified that he started looking for employment about a week after his discharge in January 2000. In or about late February 2000, he obtained a job at a company called Art-Lore Inc. Unfortunately he was discharged after a few weeks. His testimony was that he had difficulty understanding instructions given to him by his bosses because of the inadequacy of his English. The evidence regarding his discharge by Art-Lore, as testified to by Mendez and by John Serravezza, did not demonstrate that this came about because of gross misconduct on his part. Therefore, his discharge from employment at Art-Lore Inc. cannot constitute a failure to mitigate damages. *Ryder Systems*, 302 NLRB 608, 610 (1991).

In connection with his employment at Art-Lore, the evidence shows that he had gross interim earnings of \$765 and interim expenses (transportation costs) of \$219. (Net plus of \$546).

Subsequent to his employment at Art-Lore, Mendez became a livery cab driver and entered into an arrangement with a company called Amsterdam Radio Dispatcher.² Without determining the legal status of his relationship, this arrangement was essentially that Mendez worked as an independent contractor who, for a monthly fee to Amsterdam, received dispatches via two-way radio, to customers mainly in upper Manhattan and the Bronx. In doing this work, Mendez purchased his own Lincoln Town Car and purchased his own gasoline. He incurred other expenses such as the costs of obtaining a taxi license, the cost of annual drug tests and the costs of vehicle registration and safety inspections. Addition-

¹ The General Counsel also points out that if one were to use the entire year of 1999 instead of the last quarter of that year, the records would show that Mendez averaged just about 11 hours of overtime per week.

² This is different from a yellow cab because in New York, yellow cabs are allowed to cruise and pick up fares along the way. Typically, livery cab drivers get their fares from a dispatcher. That is not to say that livery cab drivers have not been known to pick up fares on the streets, especially in locations away from the central city.

ally, he incurred costs of certain vehicle equipment such as a two-way radio and a glass partition. Apart from insurance, the other major expense, according to Mendez, was for gasoline. Although he estimated that gasoline cost about \$1.47 per gallon at the time, the General Counsel proffered information indicating that average prices of gasoline in downstate New York, in the fourth quarter of 2000, was about \$1.64 per gallon. (www.nyserda.org/Energy_Information/nyepa.asp.)³

During 2001 Mendez testified that his average gross income from his cab driving work was about \$60 per day. He testified that in 2002, his average gross income was about \$75 per day and that this increased to an average of about \$80 per day during 2003. For better or worse, Mendez could not produce any records that supported these estimates.

After driving the cab for a couple of years, Mendez gave that up and acquired another job at a company called Templar Associates. He worked a 40-hour week and was paid during 2003, at the rate of \$8 per hour. In 2003, his gross earnings from Templar were \$3,200. For the year 2004 until December 6, (when a valid reinstatement offer was made), Mendez' gross earnings from Templar were \$15,840. (He received a raise to \$8.25 per hour.)

Many of his expenses associated with driving the cab were substantially documented either by receipts or were consistent with New York regulations. I therefore conclude that those expenses listed in the attached Appendix A were proven by the General Counsel. The real problem, in my opinion, was with Mendez' estimate of his expenditure for gasoline.

Mendez testified that although he occasionally made trips to the airports or to Brooklyn or Queens, the majority of his fares were local, confined to upper Manhattan and the Bronx. He testified that in the year 2000 he averaged about 12 to 14 fares per day. Assuming that his estimate of his average daily earnings is accurate, that would mean that his average fare would be \$5. And since the minimum fare at that time was \$5 for a trip of up to 20 blocks (in New York about a mile), then it would be safe to assume that his fares were for trips that averaged about 1 mile each. (This would not account for tips and I think that it would be reasonable to assume that a typical tip would be about \$1 for a fare of \$5 or more.) Taking into account, the fact that he would have to travel from the destination of fare one to get to the home of fare two, it would be reasonable to double the number of miles for each fare. Therefore, assuming that each fare would involve a trip of 2 miles, a set of 13 fares per day would take about 26 miles. Adding another 8 miles for good luck would bring us up to about 34 miles per day.

The vehicle driven by Mendez was a 1995 Lincoln Town Car. That model, according to the US Department of Energy, gets 17 miles per gallon (mpg) in city driving. (Mendez testified that there was nothing wrong with the vehicle.) See www.fueleconomy.gov. Thus, in this kind of vehicle, it

³ The General Counsel did not include the cost of the car as part of his interim expenses.

would take 2 gallons of gas to go 34 miles in city driving. And if the average price of gasoline was \$1.66 per gallon, a reasonable estimate of his average daily cost of gasoline in 2000 would be \$3.32 or \$16.68 less than he claimed.⁴

Mendez testified that he spent a good deal of his time driving around while waiting for dispatched fares. This may be so, but the only reasonable explanation for this type of otherwise fuel inefficient behavior, would be to pick up undischarged fares on the street. (Livery cabs are not legally allowed to pick up street fares.)

There are, in my opinion, two possible scenarios. In the first, Mendez accurately reported the gross revenues that he derived from dispatched fares and grossly over estimated his gasoline expenditures. The other scenario is that Mendez underestimated his gross revenues by not reporting undischarged fares and accurately estimated his gasoline expenses.

I frankly don't know which of these scenarios correctly reflects Mendez' work situation during the time that he drove the livery cab. Nevertheless, giving him the benefit of the doubt, I shall conclude that he more or less accurately estimated his gross earnings but substantially underestimated his gasoline expenses during the same period of time. In fact, I think that it is more reasonable to calculate his average gasoline expenses at about 17 percent of his claimed amount.

Notwithstanding my conclusion that Mendez substantially underestimated his gasoline expenses, I am not willing to say that he willfully withheld information from the Government in connection with the backpay investigation. It is one thing for me to conclude, based on a preponderance of the evidence standard, that Mendez did not accurately report his interim expenses. But it is quite another thing for me to conclude, particularly in the absence of any records, that I am certain that he deliberately misled the government in this regard.⁵

Nor am I persuaded that certain evidence regarding his tax returns and a mortgage application establishes that Mendez deliberately misled the government regarding his interim earnings or expenses. It is quite clear to me that Mendez, who does not speak or read English well, relied on a third person to fill out his tax returns. And based on his testimony, I doubt that he truly understood what was being done in this respect.⁶ Similarly, the application for a mortgage was dealt with through a New Jersey real estate broker

⁴ The average price of gasoline was about \$1.55 per gallon in 2001. The average price was about \$1.46 per gallon in 2002. The average price was about \$1.71 in 2003. And the average price was about \$2 per gallon in 2004.

⁵ In *American Navigation Co.*, 2689 NLRB 426 (1983), the Board held that where "discriminates found to have willfully concealed from the Board their interim employment will be denied backpay for all quarter in which they engage in the employment so concealed."

⁶ In the present case, Mendez, from the outset of the backpay investigation, fully disclosed the sources of his interim earnings including those from Atlantic Radio Dispatcher Inc. The difficulty was that in the absence of records, he may have miscalculated his gross earnings and interim expenses. (Indeed, it looks like his initial disclosure to the compliance officer was an estimate, not of his gross interim earnings and gross interim expenses but of his net interim earnings. This would be consistent with the way his income tax return was filed.) In any event, although the tax returns may be used in assessing his overall credibility, it is not the Board's function to do the Internal Revenue Service's job. *Atlantic Limousine, Inc.*, 328 NLRB 257, 258 (1999).

who was interested in making a sale. To the extent that the application may have overstated his family income, I suspect that this was done through the broker in order to ensure that Mendez would be eligible for financing.

The Respondent contends that Mendez should be credited with interim earnings resulting from the profits derived from the sale of a property and the rents derived before its sale. This contention is based on the fact that Mendez and his wife, along with a friend, jointly purchased a house in New Jersey to be used as their personal residence. A portion of that property was also rented.

Mendez was never engaged in the business of buying, selling or renting real estate. The property in question was purchased to be used as his home and a portion was rented to a relative to defray the costs on servicing the mortgage and other expenses. It is true that Mendez managed to make a profit when he sold this house, but that transaction was independent from and not related to his work. I therefore do not conclude that these property transactions constitute interim earnings and they cannot be used to reduce his backpay.

Therefore, based on the record as a whole, I conclude that the amount of backpay owed to Mendez is \$62,782.07 plus interest.

On these findings of fact and conclusions of law and on the entire record, I issue the following conclusions and recommended⁷

ORDER

The Respondent, Cibao Meat Products, shall pay Jose Luis Mendez the sum of \$62,782.07 plus interest.

Dated: Washington, D.C. May 10, 2005

APPENDIX A

Interim Expenses from Driving a Cab

Q1 2000	Drug test	\$24.00
	Taxi license	120.00
	Fingerprinting	75.00
	Training Film	35.00
	Car registration	425.25
	Car Inspection	38.00
	Total	\$731.25
Q2 2000	NYC Taxi fee	\$550.00
	Glass Partition	450.00
	Two-way radio	700.00
	Fee to Amsterdam	315.00
	Gasoline	183.00
	Auto Insurance	1,023.51
	Total	\$3,221.51
Q3 2000	Amsterdam	\$455.00

	Gasoline	265.00
	Auto Insurance	1,023.51
	Car Inspection	38.00
	Total	\$1,781.51
Q4 2000	Amsterdam	\$455.00
	Gasoline	265.00
	Auto Insurance	1,023.51
	Car Inspection	38.00
	Total	\$1,781.51
Q1 2001	Drug test	\$24.00
	Car registration	425.25
	Amsterdam	455.00
	Gasoline	265.00
	Auto Insurance	1,301.24
	Car Inspection	38.00
	Total	\$2,508.49
Q2 2001	NYC taxi fee	\$550.00
	Amsterdam	455.00
	Gasoline	265.00
	Auto Insurance	1,301.24
	Car Inspection	38.00
	Total	\$2,609.24
Q3 2001	Amsterdam	\$455.00
	Gasoline	265
	Auto Insurance	1,301.24
	Car Inspection	38.00
	Total	\$2,959.24
Q4 2001	Amsterdam	\$455.00
	Gasoline	265.00
	Auto Insurance ¹	301.24
	Car Inspection	38.00
	Total	\$2,959.24
Q1 2002	Drug test	\$24.00
	NYC taxi fee	550.00
	Amsterdam	455.00
	Gasoline	265.00
	Auto Insurance	2,280.00
	Car Inspection	38.00
	Total	\$3,612.00
Q2 2002	Amsterdam	\$455.00
	Gasoline	265.00
	Auto Insurance	2,280.00
	Car Inspection	38.00
	Total	\$3,038.00
Q3 2002	Amsterdam	\$455.00
	Gasoline	265.00
	Auto Insurance	2,280.00
	Car Inspection	38.00
	Camera for taxi	650.00
	Total	\$3,688.00
Q4 2002	Amsterdam	\$455.00
	Gasoline	265.00
	Auto Insurance	2,280.00
	Car Inspection	38.00
	Car registration	425.25
	Total	\$3,463.25
Q1 2003	Drug test	\$24.00

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Q2 2003	Amsterdam	520.00	Q3 2003	Car Inspection	38.00
	Gasoline	221.00		Total	\$2,720.24
	Auto Insurance	2,280.00		Amsterdam	\$520.00
	Car Inspection	38.00		Gasoline	221.00
	Total	\$3,083.00		Auto Insurance	1,941.24
	Amsterdam	\$520.00		Car Inspection	38.00
	Gasoline	221.00		Total	\$2,720.24
	Auto Insurance	1,941.24			

Appendix B

[illegible]